LBP-09-12

UNITED STATES OF AMERICA
NUCLER REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Ann Marshall Young, Chairman
Paul B. Abramson
R. Bruce Matthews

In the Matter of	Docket Nos. IA-08-023, IA-08-022, EA-08-174
HIMAT SONI	ASLBP Nos. 09-882-02-EA-BD01, 09-881-01-EA-BD01
DHIRAJ SONI	
EASTERN TESTING AND INSPECTION, INC.	July 16, 2009

ORDER
(Accepting Proposed Settlement and Dismissing Proceeding)

1. On February 10, 2009, the NRC Staff issued a Notice of Violation and Proposed Imposition of Civil Penalty of $13,000 to Eastern Testing and Inspection, Inc. (ETI). On the same day, the NRC Staff issued Orders (Effective Immediately) Prohibiting Involvement in NRC-Licensed Activities for a period of one year to Mr. Himat Soni, the president of ETI, and Mr. Dhiraj Soni, then vice-president of ETI.

2. On March 12, 2009, Mr. Himat Soni and Mr. Dhiraj Soni answered their orders and requested a hearing and consolidation of the proceedings.

3. On May 8, 2009, this Atomic Safety and Licensing Board – which was established by the Commission to preside over Mr. Himat Soni's and Mr. Dhiraj Soni's enforcement proceedings -- granted the hearing and consolidation requests for the individual actions.

4. On March 25, 2009, ETI answered the Notice of Violation. Although the Staff has not imposed a civil penalty, the parties included the ETI matter in negotiating settlement of all related matters.

5. The enforcement orders issued on March 12, 2009, to Mr. Himat Soni and Mr. Dhiraj Soni are modified by this Order approving and incorporating the Settlement Agreement.

6. The Staff will not issue an Order Imposing a Civil Penalty against ETI.

7. The Settlement Agreement, attached hereto, is hereby incorporated into this Order.

8. Upon review of the Settlement Agreement, the Licensing Board is satisfied that its terms reflect a fair and reasonable settlement of these matters, in keeping with the objectives of the NRC's Enforcement Policy; that it satisfies the requirements of 10 C.F.R. § 2.338(g) and (h); and that no further adjudication of any matter is required in the public interest. Accordingly, the Settlement Agreement is approved pursuant to 10 C.F.R. § 2.338(i).

9. All matters required to be adjudicated as part of this proceeding having been resolved, the proceedings ASLB-09-882-02-EA-BD01 and ASLB-09-881-01-EA-BD01 are therefore terminated.

IT IS SO ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Ann Marshall Young
ADMINISTRATIVE JUDGE

/RA/

Paul B. Abramson
ADMINISTRATIVE JUDGE

/RA/

R. Bruce Matthews
ADMINISTRATIVE JUDGE

Rockville, Maryland
July 16, 2009[1]

[1] Copies of this Order were sent this date by the agency's E-Filing system to counsel for all parties in the above-referenced proceeding.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)		
	)		
HIMAT SONI	)	Docket Nos.	IA-08-023, IA-08-022,
	)		EA-08-174
DHIRAJ SONI	)		
	)	ASLBP Nos.	09-EA-882-02-EA-BD01,
EASTERN TESTING AND INSPECTION, INC.	)		09-881-01-EA-BD01

SETTLEMENT AGREEMENT

Eastern Testing and Inspection, Inc. (ETI), located in Thorofare, New Jersey, is the holder of Byproduct Materials License No. 29-09814-01 issued by the NRC pursuant to 10 C.F.R. Part 30 in 1964. The license authorizes possession and use of sealed radioactive sources for use in radiographic exposure and portable gauge devices, and possession and use of radioactive material for shielding for radiographic and source changer equipment in accordance with the conditions specified in the license.

On February 10, 2009, the NRC Staff issued a Notice of Violation and Proposed Imposition of Civil Penalty of $13,000 (NOV) to ETI. The NOV contained the Staff determination, based on its investigation, that ETI failed to have a pre-arranged plan with the local law enforcement agency (LLEA) for assistance in response to an actual or attempted theft or sabotage of radioactive material or devices containing radioactive material, contrary to § 2.b. of NRC Order Imposing Increased Controls, EA-05-090, Attachment B (IC Order) dated November 14, 2005. The violation occurred from May 13, 2006 to November 17, 2006, when a Department of Energy (DOE) contractor removed all of ETI's NRC-regulated material.

The NOV also contained the Staff determination that ETI submitted information to the NRC in a December 16, 2005, letter that was not complete and accurate in all material respects, contrary to 10 C.F.R. § 30.9. The Staff concluded that contrary to ETI's submittal in the December 16, 2005, letter, ETI had not had discussions with the LLEA regarding compliance

with IC Order § 2.b. ETI, however, maintains that the discussions it had with the LLEA prior to December 16, 2005, were preliminary and notified the LLEA of ETI's desire to meet with LLEA officials, and does not agree with NRC Staff's characterization of its statements.

On February 10, 2009, the NRC Staff issued an Order (Effective Immediately) Prohibiting Involvement in NRC-Licensed Activities to Mr. Himat Soni, the president of ETI. The order prohibited Mr. Himat Soni from engaging in NRC-licensed activities for a period of one year. In the order, the Staff concluded that Mr. Himat Soni violated 10 C.F.R. § 30.10 because he knew that the prearranged plan with the LLEA was required by May 13, 2006, that an arrangement to have ETI's radiological materials removed by a DOE contractor was not a substitute for the prearranged plan, and that ETI failed to ensure that the plan was in place. Mr. Himat Soni denies that he violated 10 C.F.R. § 30.10 because he did not deliberately or knowingly violate the IC Order. He maintains that his efforts to have the DOE contractor remove the NRC-regulated material from ETI before the IC Order deadline had, initially, obviated ETI’s need for a prearranged plan with the LLEA, but that the DOE contractor removed the material much later than anticipated, through no fault of ETI's, causing the IC Order violation. He furthers maintains that his efforts to comply with the other requirements of the IC Order indicated his intent to come into full compliance.

On February 10, 2009, the NRC Staff issued an Order (Effective Immediately) Prohibiting Involvement in NRC-Licensed Activities to Mr. Dhiraj Soni, the vice-president of ETI. The order prohibited Mr. Dhiraj Soni from engaging in NRC-licensed activities for a period of one year. In the order, the Staff concluded that Mr. Dhiraj Soni submitted incomplete and inaccurate information that was material to the NRC in conversations with an NRC inspector on September 20, 2006, in violation of 10 C.F.R. § 30.10, by stating that ETI had preliminary discussions with the LLEA when it had not had discussions with the LLEA regarding compliance with IC Order § 2.b. Mr. Dhiraj Soni denies that his statements made at any time to NRC officials were inaccurate, incomplete, false, misleading, or material, and further maintains that

his contact with the LLEA simply informed officers that Mr. Himat Soni intended to meet with the LLEA, which meeting in fact subsequently occurred on December 18, 2006.

On March 12, 2009, Mr. Himat Soni and Mr. Dhiraj Soni answered their orders individually, denied the allegations, provided detailed affidavits explaining why they maintained that no inaccurate, misleading, or incomplete material information was knowingly, intentionally, deliberately, or willfully provided to NRC; disputed the conclusion that 10 C.F.R. §§ 30.9 and 30.10 were violated; and asked for a hearing. On May 8, 2009, the Atomic Safety and Licensing Board established by the Commission to preside over Mr. Himat Soni's and Mr. Dhiraj Soni's enforcement proceedings granted Mr. Himat Soni's and Mr. Dhiraj Soni's hearing requests.

On March 25, 2009, ETI answered the NOV, acknowledged that violations of the IC Order had occurred, but denied that the violations were deliberate or willful, and denied that it had violated 10 C.F.R. § 30.9.

Staff counsel and counsel for ETI, Mr. Himat Soni, and Mr. Dhiraj Soni have engaged in negotiations and determined that it is in the public interest to terminate this proceeding without further litigation subject to the following stipulations.

THE PARTIES AGREE AND STIPULATE AS FOLLOWS:

A. None of the parties to this agreement admit facts or agree to conclusions of law other than those specifically stipulated herein.

B. The parties agree to disagree on the Staff's conclusions.

C. ETI was required to comply with the IC Order, which included the requirement to implement a prearranged plan with the LLEA pursuant to IC Order § 2.b, by May 13, 2006.

D. ETI submitted a letter to the NRC on December 16, 2005, stating with respect to IC Order § 2.b., that ETI had had preliminary discussions with the LLEA and would file a written procedure when finalized, by May 1, 2006.

E. ETI was not in compliance with IC Order § 2.b. on the May 13, 2006 compliance date because it did not have a prearranged plan with the LLEA.

F. By September 20, 2006, ETI had not established a prearranged plan with the LLEA. On that date, an NRC inspector discussed this violation with ETI president Mr. Himat Soni and then vice-president Mr. Dhiraj Soni.

G. ETI achieved compliance with the IC Order on November 17, 2006 when a DOE contractor removed all remaining NRC-regulated materials from ETI's site.

H. ETI finalized its prearranged plan with the LLEA on January 11, 2007.

IN CONSIDERATION OF THE ABOVE, THE STAFF, ETI, HIMAT SONI, AND DHIRAJ SONI AGREE TO THE FOLLOWING IN SETTLEMENT OF EA-08-174, IA-08-022, AND IA-08-023:

1. NRC Region I will incorporate the Board Order confirming this Settlement Agreement into ETI's license, so that if New Jersey acquires, pursuant to an agreement with the NRC under § 274b of the Atomic Energy Act (AEA), regulatory authority over the license for ETI's New Jersey site, jurisdiction over the Board Order will transfer to the New Jersey Department of Environmental Protection (NJDEP).

2. Upon submitting for approval to work under a reciprocity agreement pursuant to 10 C.F.R. § 150.20 or the New Jersey equivalent, ETI will send a copy of the Board Order confirming this Settlement Agreement to the regulator processing the reciprocity application at least two weeks prior to engaging in activity authorized by the reciprocity agreement, with a copy to the Director, Division of Nuclear Materials Safety, US NRC Region I and the NJDEP.

3. After the Board Order affirming this Settlement Agreement and at least 30 days prior to initially taking possession of AEA materials in New Jersey, which will not occur before November 10, 2009, ETI will develop and implement a required annual training program that describes the requirements in 10 C.F.R. §§ 30.9 and 30.10, or the NJDEP equivalent regulations, to employees using licensed material. This training will also be included in ETI's initial training program. ETI will provide the Director, Division of Nuclear Materials Safety, US NRC Region I and the NJDEP, a copy of the training material and the list of attendees of the first training session within 30 days of the first training session.

4. After the Board Order affirming this Settlement Agreement and at least 30 days prior to initially possessing AEA materials in New Jersey, which will not occur before November 10, 2009, ETI will initiate the use of a commitment tracking system, which will ensure ETI commitments under this Settlement Agreement, NRC or NJDEP reporting requirements, and similar future commitments are tracked and met.

5. If ETI possesses AEA material in New Jersey, ETI will contract with an independent consultant to evaluate the effectiveness of its security and radiation safety programs:

(a) Within 30 days of initially possessing AEA material, ETI will submit to the NRC and NJDEP for approval, the name(s) and qualifications of an independent consultant(s) to review and evaluate ETI's security and radiation safety program in New Jersey.

(b) Within 30 days of approval of the consultant, the consultant will commence an assessment of ETI's security and radiation safety program in New Jersey.

(c) The consultant will review ETI’s security and safety programs in New Jersey and provide recommendations for improvement, if necessary.

(d) Within 30 days following completion of his reviews, the consultant will provide ETI a report discussing its findings and recommendations, if any, for program improvements. At the same time the consultant provides its report to ETI, the consultant will send a copy to the Director, Division of Nuclear Materials Safety, US NRC Region I and the NJDEP.

(e) Within 30 days of receiving the consultant's report, ETI will provide in writing, its position on how it will address the consultant's findings to the Director, Division of Nuclear Materials Safety, US NRC Region I and the NJDEP.

6. The above provisions do not apply to any existing NRC licensee that may purchase ETI. ETI will promptly notify NRC Region I if any existing NRC licensee agrees to

purchase ETI. However, should ETI change names and do business as another named company, the provisions of the Board Order confirming this Settlement Agreement will continue to apply.

7. The parties agree to a civil penalty of $4,500. ETI will pay $4,500 to the NRC within 30 days of the Board's confirmation of this Settlement Agreement in accordance with NUREG/BR-0254 and submit to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, a statement indicating when and by what method payment was made.

8. The Staff will not issue an Order Imposing a Civil Penalty against ETI.

9. ETI will not possess AEA materials in New Jersey until November 10, 2009.

10. Mr. Himat Soni has not had any involvement in NRC-licensed activities since February 10, 2009, and will continue to have no involvement in NRC-licensed activities until after Board confirmation of this Settlement Agreement, but in any event, no sooner than August 10, 2009.

11. Mr. Dhiraj Soni has not had any involvement in NRC-licensed activities since February 10, 2009, and will continue to have no involvement in NRC-licensed activities until February 10, 2010.

12. The parties will submit this Settlement Agreement to the Board for approval with a joint motion requesting approval of the settlement and termination of the proceeding with prejudice based on the resolution of matters in this Settlement Agreement. This Settlement Agreement will become effective upon its execution by both parties; however, the agreement is contingent upon approval by the Board pursuant to 10 C.F.R. § 2.203. Upon approval by the Board, this Settlement Agreement will have the same force and effect as an Order made after a full hearing.

13. Within 30 days of confirmation of this Settlement Agreement by the Board, the Staff will replace the current discussions of the orders issued to Mr. Himat Soni and Mr. Dhiraj Soni on its website with this Settlement Agreement.

14. The parties agree that all further procedural steps before the Board and any right to challenge or contest the validity of the Board Order entered into in accordance with this Settlement Agreement, and all the rights to seek judicial review or otherwise to contest the validity of the Order, are expressly waived.

IN WITNESS THEREOF, ETI, Mr. Himat Soni, Mr. Dhiraj Soni, and the NRC Staff have caused this Settlement Agreement to be executed by their duly authorized representatives on this 13th day of July, 2009.

Respectfully submitted,

Molly L. Barkman
Kimberly A. Sexton
Counsel for the NRC Staff

Robert M. Andersen
Akerman Senterfitt, LLP
Counsel for ETI, Himat Soni, and Dhiraj Soni

Dated at Rockville, MD and Washington, DC
this 13th day of July, 2009

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
HIMAT SONI	)	Docket No. IA-08-023-EA
	)	
	)	
	)	
(Enforcement Action)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing ORDER (ACCEPTING PROPOSED SETTLEMENT AND DISMISSING PROCEEDING) (LBP-09-12) have been served upon the following persons by Electronic Information Exchange.

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[Original signed by Christine M. Pierpoint]

Office of the Secretary of the Commission

Dated at Rockville, Maryland
this 16th day of July 2009